

35759

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CHRISTI MARIE BECK-SAMMS,

Plaintiff,

v.

CIVIL ACTION NO. 09-C-1083  
(Judge King)

GREGORY ALLEN SAMMS; and  
CHADRICK R. PORTER,

Defendants.

**ORDER GRANTING DEFENDANT SAMMS'  
MOTION TO DISMISS**

On January 13, 2010, came Plaintiff Christi Marie Beck-Samms, by counsel, Mark W. Kelly, Esq., and Defendant Gregory Allen Samms, by counsel Mark A. Swartz, Esq., for hearing on Defendant's Motion to Dismiss. Upon review of the briefs of the parties and the entirety of the record, and considering the arguments of counsel, the Court makes the following determinations:

**FINDINGS OF FACT**

1. The parties were divorced by an Agreed Final Order entered August 16, 2007, in the Family Court of Kanawha County, West Virginia, which order incorporated a property settlement agreement and agreed parenting plan.
2. Neither party has heretofore appealed the Agreed Final Order to Circuit Court, moved for reconsideration thereof, or moved for relief under *W. Va. R. Civ. P.* 60(b).
3. The Agreed Final Order became a final, non-appealable Order upon the expiration of the statutory time limits for appeal.

4. All issues pertaining to the divorce were resolved by the Agreed Final Order.

### CONCLUSIONS OF LAW

1. W. Va. Code § 51-2A-2(b) states as follows regarding circuit court jurisdiction:

If an action for divorce, annulment or separate maintenance **does not require the establishment of a parenting plan or other allocation of custodial responsibility or decision-making responsibility for a child and does not require an award or any payment of child support**, the circuit court has concurrent jurisdiction with the family court over the action if, at the time of the filing of action, the parties also file a written property settlement agreement executed by both parties. (Emphasis added).

2. The parties' divorce presented parenting plan issues and required the entry of a child support order and a medical support order because there were and are four minor children at issue. Accordingly, jurisdiction rested with the Family Court in the first instance. Circuit Court jurisdiction could only be invoked by petition for appeal from the final Family Court Order.

3. W. Va. Fam. R. Civ. P. 28 provides:

(a) Time for petition.

A party aggrieved by a final order of a family court may file a petition for appeal to the circuit court no later than thirty days after the family court final order was entered in the circuit clerk's office.

4. Plaintiff Beck-Samms did not file an appeal from the Agreed Final Order within the time prescribed by statute, or at any later time.

5. W. Va. R. Civ. P. 60(b) provides that the court may relieve a party from a final order for the following reasons:

(1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been

discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . . ; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was taken. . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. (emphasis added).

6. In this action, Plaintiff alleges, at a minimum, that Defendants committed fraud against her within the meaning of Rule 60(b)(3), i.e., "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." However, inasmuch as the dismissal of this action occurred in 2007, relief under Rule 60(b)(3) is no longer available to the appellant because it is barred by the 1 year filing limit, set forth above, particular to that ground of relief under Rule 60(b). *Withrow v. Williams*, 216 W. Va. 385, 607 S.E.2d 491 (2004).

7. If Plaintiff were contending that the fraud committed by Defendants went beyond "simple" fraud under Rule 60(b)(3) and, instead, constituted a "fraud upon the court," that claim would not be subject to the one year filing limitation.

A claim of fraud upon the court is reserved for only the most egregious conduct on the part of attorneys, court officials, or judges which causes the judicial process to be subverted. *It ordinarily does not relate to misrepresentation or fraudulent conduct between the parties themselves.*

*Savas v. Savas*, 181 W. Va. 316; 382 S.E.2d 510 (1989)(emphasis added).

8. Here, there is nothing to suggest a fraud upon the Court, i.e., that Defendant made any misrepresentations directly to the Family Court, or to anyone other than Plaintiff. She says she was told this was a "good deal" for her, and she believes it was not.

6. Rule 60(b)(5) of the West Virginia Rules of Civil Procedure, which permits relief from a judgment where "it is no longer equitable that the judgment should have prospective application," is ordinarily limited to instances where the controlling circumstances of the action have changed subsequent to the entry of the judgment. It is not to be invoked as a substitute for an appeal. In considering a motion for relief under Rule 60(b)(5), a circuit court should proceed with caution. *Nancy Darlene M. v. James Lee M., Jr.*, 195 W. Va. 153; 464 S.E.2d 795 (1995).

7. W. Va. Code § 51-2A-10 provides:

(a) Any party may file a motion for reconsideration of a temporary or final order of the family court for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been available at the time the matter was submitted to the court for decision; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) clerical or other technical deficiencies contained in the order; or (5) any other reason justifying relief from the operation of the order.

(b) A motion for reconsideration must be filed with the clerk of the circuit court within a reasonable time and for reasons set forth in subdivisions (1), (2) or (3), subsection (a) of this section, not more than one year after the order was entered and served on the other party in accordance with rule 5 of the Rules of Civil Procedure. The family court must enter an order ruling on the motion within thirty days of the date of the filing of the motion.

8. Plaintiff Beck-Samms has not heretofore filed a Rule (60)(b) motion for relief, or a motion for consideration, within the time limits provided by statute, or at any other time.

9. Plaintiff Beck-Samms alleges she was fraudulently induced to enter into the Agreed Final Order by Defendants, who told her it was a "good deal" when it was not. While she contends she is not seeking a "do over" in Circuit Court, Plaintiff says in her Response to Defendant's Motion to Dismiss that she "seeks damages for the

*support and assets she was supposed to receive* [in the divorce case], plus additional damages as allowed by law.” (Emphasis added).

10. There was a final adjudication on the merits in the family court; the final family court order adjudicated spousal support, child support, parenting and the equitable distribution of the marital estate. The family court action was between the above-named Plaintiff Samms and the above-named Defendant Samms. The damage claims asserted in the above-entitled circuit court action are for “damages for the *support and assets she was supposed to receive*” in the divorce case. Hence, the three elements required for the bar of *res judicata* to be applied are here present. Syl. Pt. 2, *Sinkewitz v. City of Huntington*, 217 W. Va. 265, 617 S.E.2d 812 (2005); Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

11. “An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. An erroneous ruling of the court will not prevent the matter from being *res judicata*. *Sinkewitz, supra*; Syl. Pt. 3, *Slider v. State Farm Mut. Auto Ins. Co.*, 210 W. Va. 476, 557 S.E.2d 883 (2001).

12. Plaintiff’s claims are barred by the doctrine of *res judicata*.

13. Collateral estoppel is a parallel doctrine to *res judicata* and is intended to foreclose re-litigation of issues in a second suit when the issues were actually litigated in an earlier suit. *Res judicata* bars claims asserted and those which could have been asserted; collateral estoppels only bars claim made.

But where the causes of action are not the same, the parties being identical or in privity, the bar extends to only those matters which were actually litigated in the former proceeding, as distinguished from those matters that might or could have been litigated therein, and arises by way of estoppel rather than by way of strict *res adjudicata*. *Lane v. Williams*, 150 W. Va. 96, 100, 144 S.E.2d 234, 236 (1965).

14. The doctrine of collateral estoppel also requires, as does *res judicata*, that the first judgment be rendered on the merits and be a final judgment by a court having competent jurisdiction over the subject matter and the parties. *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983). Accordingly, a final order setting alimony and child support cannot be collaterally attacked due to an alleged insufficiency of evidence if the period for appeal has expired. *Nancy Darlene M. V. James Lee M.*, 184 W. Va. 447, 400 S.E.2d 882 (1990); Syl. pt. 1, *Robinson v. Robinson*, 169 W. Va. 425, 288 S.E.2d 161 (1982).

15. The causes of action/damage claims set forth in Plaintiff's Complaint in this Court are identical to those addressed in the Family Court's Final Order: child support, alimony, parenting and equitable distribution. They are also barred by the doctrine of collateral estoppel.

#### **ORDER**

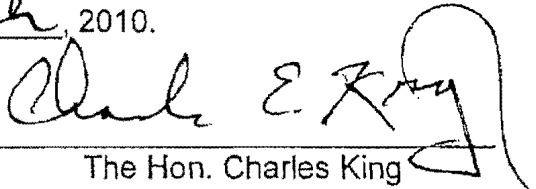
Upon the above findings and conclusions, **IT IS HEREBY ORDERED:**

1. That the above-entitled action be and the same is hereby dismissed as to the Defendant Samms;
2. That the objections and exceptions of the parties to any adverse findings or rulings of the Court are duly noted and preserved; and

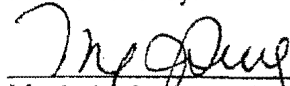
3. That the Clerk of this Court is further directed to send an attested copy of this

Order to all counsel of record and to the parties.

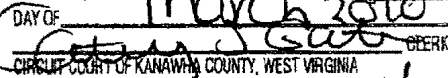
ENTERED this 9<sup>TH</sup> day of March, 2010.

  
The Hon. Charles King

Presented by:



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STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 12<sup>TH</sup>  
DAY OF March, 2010.  
  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTI MARIE BECK-SAMMS,

Petitioner,

v.

GREGORY ALLEN SAMMS; and  
CHADRICK R. PORTER,

Respondents.

Civil Action No. C-10-083  
Judge King

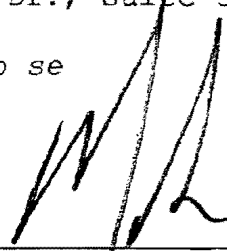
FILED  
2010 JUL 12 PM 2:22  
CATHY S. GARDNER, CLERK  
KANAWHA COUNTY CIRCUIT COURT

CERTIFICATE OF SERVICE

I, Mark W. Kelley, an attorney for Petitioner Christi Marie Beck-Samms, hereby certify that on July 12, 2010, I served a true and correct copy of the foregoing "**DOCKETING STATEMENT**" on the parties hereto via U.S. Mail, first class, postage prepaid, addressed as follows:

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